

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

FCC 95-24

In the Matter of  
the Commission's Forfeiture  
Policy Statement and  
Amendment of Section 1.80  
of the Rules to Incorporate  
the Forfeiture Guidelines

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CI Docket No. 95-6

**NOTICE OF PROPOSED RULEMAKING**

**Adopted:** January 13, 1995

**Released:** February 10, 1995

**Comment Date:** March 27, 1995

**Repy Comment Date:** April 17, 1995

**By the Commission:**

**I. Introduction**

1. In United States Telephone Association v. FCC, 28 F.3d 1232 (D.C. Cir. 1994), the United States Court of Appeals for the District of Columbia Circuit set aside the Commission's Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339 (1992), revised, 8 FCC Rcd 6215 (1993) (Forfeiture Policy Statement). The Court found that the Forfeiture Policy Statement as implemented by the Commission had the status of a rule and thus was improperly issued without notice and comment. See 5 U.S.C. § 553(b). This Notice of Proposed Rulemaking (NPRM) seeks comments on the Forfeiture Policy Statement and proposes to amend Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, by adding a note that incorporates the guidelines for assessing FCC forfeitures.

**II. DISCUSSION**

2. The proposed forfeiture guidelines are identical to the 1993 version appended to the Forfeiture Policy Statement and are attached as Appendix A. If adopted, we would be guided by these guidelines, but remain free to exercise

discretion in specific cases. See Guardian Federal Savings & Loan Ass'n v. Federal Savings and Loan Insurance Co., 589 F. 2d 658 (D.C. Cir. 1978).

3. The benefits of our adopting such a schedule would include comparable treatment of similarly situated offenders and clearer guidance to the public regarding the forfeitures that can be expected in response to specific violations. Adopting such standards also would increase our administrative efficiency in determining the appropriate range of forfeitures for various offenses, is consistent with a recommendation of the Administrative Conference of the United States (ACUS), and is similar to approaches adopted by certain other regulatory agencies.<sup>1</sup> However, it is possible that, notwithstanding the adjustment factors provided for in the guidelines and the flexibility the Commission retains in determining the amount of a fine in any particular case, different categories of licensees may be impacted disproportionately under a guidance-based system.

4. We request comment on all aspects of the proposal, including on the advantages and disadvantages of adopting forfeiture guidelines instead of proceeding on our traditional case-by-case basis. We ask commenters to address whether licensees are benefitted or disadvantaged by the guideline system, and more generally, whether the benefits of the guideline system outweigh any perceived detriments. With respect to the guidelines themselves, we ask whether the base forfeiture amounts set forth in the guidelines are set at appropriate levels, or whether some may be set either too high or too low based on the nature of the violation. We request comment on the use of different base forfeiture amounts for similar violations in different services in light of the different maximum forfeiture amounts for the different services set forth in the statute. See 47 U.S.C. §§ 503(b)(2)(A)-(C). Commenters who disagree with this approach should propose alternative approaches and explain how their proposals would reflect the distinctions among services in the statute for purposes of maximum forfeiture amounts. For example, if the base forfeiture amounts for all services were set at the same level, should the Commission adopt different ranges for the adjustment factors to reflect the different statutory maxima? As an alternative, should the Commission eliminate the ranges for the adjustment factors? We, thus, ask for comments on the proposed base amounts, adjustment factors, and adjustment factor ranges.

5. In concluding that we may not implement the Forfeiture Policy Statement and guidelines without notice and comment, the Court did not question our authority to adopt the Forfeiture Policy Statement to provide general guidance that does not bind the Commission or its staff. Thus, we propose to incorporate the guidelines as a

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<sup>1</sup>See ACUS, Agency Assessment and Mitigation of Civil Money Penalties, Recommendation No. 79-3. See also 10 C.F.R. Chapt. 1, Part 2, App. C (General Statement of Policy and Procedure for NRC Enforcement Actions)(1994).

note to our forfeiture rule (47 C.F.R. § 1.80) and to clarify that the guidelines set forth general guidance that the Commission and the staff may choose to apply in appropriate cases. We continue to believe that, ultimately, every decision must be based on the specific facts and equities at issue, taking into account the factors set forth in Section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D). Thus, under the Policy Statement the Commission would retain discretion to depart from the guidelines in appropriate circumstances. In this regard, we stress that the adjustment factors set forth in the guidelines, which track Section 503(b)(2)(D) closely, are not intended to be exclusive adjustment factors. Similarly, it is not our intent that the guidelines be read to require that a forfeiture be issued in any particular case. The Commission would retain discretion not to issue a forfeiture in particular circumstances. We ask for comment on this proposal and whether, in the alternative, we should adopt the guidelines as a binding rule.

6. If retained, we propose to apply the Forfeiture Policy Statement and guidelines to all forfeiture proceedings begun after the effective date of the Forfeiture Policy Statement and guidelines. For forfeiture proceedings begun but not completed before the effective date, we propose to reach decisions on a case-by-case basis as we have been doing since issuance of the USTA decision. We ask for comment on this approach and whether, if the Forfeiture Policy Statement and guidelines are adopted, they should be applied to all cases pending as of the time of their effective date.

7. Our goal in this proceeding is to carefully examine all issues related to the imposition of forfeitures based on a system of guidelines. We ask interested parties for their views and suggestions on any matters germane to resolving these issues.

### III. CONCLUSION

8. This Notice of Proposed Rulemaking is issued under the authority contained in Sections 4(i), 303(r), and 503(b) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 303(r), 503(b). Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before March 27, 1995, and reply comments April 17, 1995. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

9. **Ex Parte Rules - Non-Restricted Proceeding:** This is a non-restricted notice and comment rule making proceeding. Members of the public are advised that ex parte presentations are permitted except during the Sunshine Agenda period. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

#### **IV. Initial Regulatory Flexibility Act Analysis**

10. **Reason for Action:** This proposed rulemaking is designed to solicit comments regarding the Commission's proposed re-adoption of the Forfeiture Policy Statement, 8 FCC Rcd 6215 (1993), which was vacated by the United States Court of Appeals for the District of Columbia Circuit in United States Telephone Ass'n v. FCC, 28 F. 3d 1232 (D.C. Cir. 1994).

11. **Objectives:** The Commission is seeking information regarding the guidelines to be used in implementing its authority to issue increased monetary forfeiture penalties.

12. **Legal Basis:** The proposed action is authorized under the authority contained in Sections 4(i), 303(r), and 503(b) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 303(r), 503(b).

13. **Reporting, Recordkeeping and Other Compliance Requirements:**  
None.

14. **Federal Rules Which Overlap, Duplicate or Conflict With These Rules:**  
None.


15. **Description, Potential Impact, and Number of Small Entities Involved:**  
Adoption of this Policy Statement could affect all licensees, including those that qualify as small business entities, who receive a monetary forfeiture as a result of a violation of the Communications Act or of the Commission's Rules. Non-licensees may also be liable for a monetary forfeiture if violations are repeated and they have previously received a warning or citation.

16. **Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:** The Notice solicits comments on better ways to accomplish the goals of developing guidelines for determining forfeiture amounts and providing notice to the public about the range of forfeiture amounts that may be assessed in particular cases. We are unable to assess at this time what, if any, economic impact the proposed rule change would have on small business entities. A full assessment of the potential economic impact, as required by Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354, 5 U.S.C. § 605(b)) will be made, if applicable, at the final rulemaking stage.

## **V. Ordering Clause**

17. IT IS ORDERED that the Secretary shall send a copy of this Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No., 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1994).

## **FEDERAL COMMUNICATIONS COMMISSION**

  
William F. Caton  
Acting Secretary

## **APPENDIX A**

### **Part 1--PRACTICE AND PROCEDURE**

1. The authority citation for Part 1 continues to read as follows:

**AUTHORITY: 47 U.S.C. 154, 303, 503(b)(5); 5 U.S.C. 552; 21 U.S.C. 853a, unless otherwise noted.**

2. Section 1.80 is amended by adding a note to read as follows:

#### **§1.80 Forfeiture proceedings.**

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \*

**Note: GUIDELINES FOR ASSESSING FCC FORFEITURES<sup>2</sup>**

**I. BASE AMOUNTS FOR SECTION 503 FORFEITURES**

VIOLATION	% of Stat. Max.	BC/CABLE \$25,000	CC \$100,000	OTHER \$10,000
Misrepresentation/lack of candor	80%	20,000	80,000	8,000
Construction and/or operation without an instrument of authorization for the service	80%	20,000	80,000	8,000

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<sup>2</sup> The Commission and its staff may use these guidelines in particular cases. The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute. The forfeiture ceilings per violation or per day for a continuing violation stated in Section 503 of the Communications Act and the Commission's Rules are \$100,000 for common carriers or applicants, \$25,000 for broadcasters and cable operators or applicants, and \$10,000 for all others. These base amounts listed are for a single violation or single day of a continuing violation. 47 U.S.C. § 503(b)(2); 47 C.F.R. § 1.80. For continuing violations involving a single act or failure to act, the statute limits the forfeiture to \$1,000,000 for common carriers or applicants, \$250,000 for broadcasters and cable operators or applicants, and \$75,000 for all others. *Id.* There is an upward adjustment factor for repeated or continuous violations, see Section II, *infra*. That upward adjustment is not necessarily applied on a per violation or per day basis. *Id.* Unless Commission authorization is required for the behavior involved, a Section 503 forfeiture proceeding against a non-licensee or non-applicant who is not a cable operator or is not operating in the radio control or citizens band radio service can only be initiated for a second violation, after issuance of a citation in connection with a first violation. 47 U.S.C. § 503(b)(5). A citation is not required, however, for non-licensee tower owners who have previously received notice of the obligations imposed by Section 303(q) from the Commission or the permittee or licensee who uses that tower. *Id.* Forfeitures issued under other sections of the Act are dealt with separately in Section III below.

Unauthorized substantial transfer of control	80%	20,000	80,000	8,000
<b>VIOLATION</b>	<b>% of Stat. Max.</b>	<b>BC/CABLE \$25,000</b>	<b>CC \$100,000</b>	<b>OTHER \$10,000</b>
Violations of rules relating to distress & safety frequencies	80%	20,000	80,000	8,000
False distress communications	80%	20,000	80,000	8,000
Alien ownership violation	80%	20,000	80,000	8,000
Failure to permit inspection	75%	18,750	75,000	7,500
Violation of operator service requirements	75%	n.a.	75,000	7,500
Violation of pay-per-call requirements	75%	n.a.	75,000	7,500
Unauthorized conversion of long distance telephone service	75%	n.a.	75,000	n.a.
Malicious interference	70%	17,500	70,000	7,000
Importation or marketing of unauthorized equipment	70%	n.a.	70,000	7,000
Exceeding authorized antenna height	60%	15,000	60,000	6,000
Transmission of indecent/obscene material	50%	12,500	n.a.	5,000
Violation of political rules: reasonable access, lowest unit charge, equal opportunities and discrimination	50%	12,500	n.a.	n.a.
Fraud by wire, radio or television	50%	12,500	50,000	5,000



Exceeding power limits	40%	10,000	40,000	4,000
No licensed operator on duty	40%	10,000	n.a.	4,000
<b>VIOLATION</b>	<b>% of Stat. Max.</b>	<b>BC/CABLE \$25,000</b>	<b>CC \$100,000</b>	<b>OTHER \$10,000</b>
Failure to maintain directional pattern within prescribed parameters	40%	10,000	n.a.	n.a.
Failure to respond to Commission communications	40%	10,000	40,000	4,000
Unauthorized emissions	40%	10,000	40,000	4,000
Using unauthorized frequency	40%	10,000	40,000	4,000
EBS equipment not installed or operational	40%	10,000	n.a.	n.a.
Violation of children's television commercialization or programming requirements	40%	10,000	n.a.	n.a.
Violation of main studio rule	40%	10,000	n.a.	n.a.
Violation of broadcast hoax rule	40%	10,000	n.a.	n.a.
Failure to engage in required frequency coordination	40%	10,000	40,000	4,000
AM tower fencing	40%	10,000	n.a.	n.a.
Failure to comply with prescribed lighting & marking	varies	8,000	8,000	8,000
Violation of public file rules	20%	5,000	20,000	n.a.

Unauthorized discontinuance of service	20%	5,000	20,000	2,000
Use of unauthorized equipment	20%	5,000	20,000	2,000
Construction or operation at unauthorized location	20%	5,000	20,000	2,000

<b>VIOLATION</b>	<b>% of Stat. Max</b>	<b>BC/CABLE \$25,000</b>	<b>CC \$100,000</b>	<b>OTHER \$10,000</b>
Violation of transmitter control and metering requirements	20%	5,000	20,000	2,000
Failure to file required forms or information	20%	5,000	20,000	2,000
Violation of sponsorship ID requirements	20%	5,000	n.a.	n.a.
Violation of requirements pertaining to broadcasting of lotteries or contests	20%	5,000	n.a.	n.a.
Broadcasting telephone conversations without authorization	20%	5,000	n.a.	n.a.
Failure to make required measurements or conduct required monitoring	10%	2,500	10,000	1,000
Violation of enhanced underwriting requirements	10%	2,500	n.a.	n.a.
Failure to provide station ID	5%	1,250	5,000	500
Unauthorized pro forma transfer of control	5%	1,250	5,000	500

Failure to maintain required records	5%	1,250	5,000	500
Miscellaneous minor violations	2.5%	625	2,500	250

## II. ADJUSTMENT CRITERIA FOR SECTION 503 FORFEITURES<sup>3</sup>

### Upward Adjustment Criteria

(1) Egregious misconduct	50-90%
(2) Ability to pay/relative disincentive <sup>4</sup>	50-90%
(3) Intentional violation	50-90%
(4) Substantial harm	40-70%
(5) Prior violations of same or other requirements	40-70%
(6) Substantial economic gain	20-50%
(7) Repeated or continuous violation	varies <sup>5</sup>

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<sup>3</sup> Both upward and downward adjustments are applied to the base forfeiture amount. More than one factor may apply in a given case. This list of factors is intended to include the most common situations that arise under section 503(b)(2)(D) and is not intended to limit the Commission's discretion under that section.

<sup>4</sup> The Commission is required by the Communications Act to take ability to pay into consideration in assessing forfeiture amounts. 47 U.S.C. § 503(b)(2)(D).

<sup>5</sup> The percentage adjustment for this criterion could vary up to the statutory maximum per violation or per day of a continuing violation.

### **Downward Adjustment Criteria**

(1) Minor violation <sup>6</sup>	50-90%
(2) Good faith or voluntary disclosure	30-90%
(3) History of overall compliance	20-50%
(4) Inability to pay	varies <sup>7</sup>

### **III. NON-SECTION 503 FORFEITURES**

<b>Violation</b>	<b>Statutory Amount<sup>8</sup></b>
Sec. 202(c) Common carrier discrimination	\$6,000 \$300/day
Sec. 203(e) Common carrier tariffs	\$6,000 \$300/day
Sec. 205(b) Common carrier prescriptions	\$12,000
Sec. 214(d) Common carrier line extensions	\$1,200/day

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<sup>6</sup> A "minor" violation is misconduct which is at a low level of seriousness within the violation category. A minor violation is the opposite of "egregious misconduct."

<sup>7</sup> As noted above, the Commission is required by the Communications Act to take ability to pay into consideration in assessing forfeiture amounts. 47 U.S.C. § 503(b)(2)(D). The application of a downward adjustment for inability to pay is based upon a showing of substantial financial hardship. Inability to pay would generally be considered as a downward adjustment factor only upon a specific showing by the entity against whom forfeiture action is taken. However, in cases involving violations by individuals who are not in the business of providing radio services, e.g., recreational licensees, financial hardship may be presumed to exist in appropriate cases prior to a specific showing.

<sup>8</sup> Unlike section 503, which establishes maximum forfeiture amounts, other sections of the Act, with one exception, state prescribed amounts of forfeitures for violations of the relevant section. These amounts are then subject to mitigation or remission under section 504 of the Act. The one exception is section 223 of the Act, which provides a maximum of \$50,000 per day. For convenience, the Commission will treat the \$50,000 set forth in section 223 as if it were a prescribed base amount, subject to downward adjustments.

Sec. 219(b)	Common carrier reports	\$1,200
Sec. 220(d)	Common carrier records & accounts	\$6,000/day
Sec. 223	Dial-a-Porn	\$50,000 maximum/day
Sec. 364/386	Ship radio	\$5,000/day (owner) \$1,000 (master)
Sec. 506	Great Lakes Agreement	\$500/day (owner) \$100 (master)
Sec. 634	Cable EEO	\$500/day

**Note:** Non-section 503 forfeitures may be adjusted downward using the "Downward Adjustment Criteria" shown for section 503 forfeitures in Section II above.